Supreme Court U.S.
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No. 01-1379

In The

# Supreme Court of the United States

ROSE MARIE S. SPANAGEL, individually and as personal representative of the Estate of Robert J. Spanagel,

*Petitioner,*

v.

SUPPORTIVE CARE SERVICES, INC.,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Delaware**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Respondents disagree with the question presented by the Petitioner. The proper question presented is whether the Delaware Supreme Court committed reversible error when it affirmed a ruling of the trial court granting, and then refusing to vacate, a default judgment against the Petitioner and her late husband.

Respondents contest the Petitioner's assertion that the Respondents' counsel committed a fraud upon the Court or that he admitted to perjury. Those allegations are completely false and unsupported by the record.

## PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

The Petitioner identifies John H. Williams, Jr., Esquire ("Mr. Williams") as a party to the proceedings in the state court, but incorrectly states that Mr. Williams is "not legal entity (sic) to this proceeding." Pet. at ii. The Petitioner further incorrectly states that Mr. Williams was illegally appointed by the Register of Wills for New Castle County, Delaware. *Id.*

The Petitioner is mistaken. This suit was filed by Supportive Care Services, Inc. ("SCS") which, at the time, was the court-appointed guardian of the property of Mrs. Aline G. Brugmann ("Mrs. Brugmann"). The suit sought the imposition of a constructive trust over certain real property the Petitioner and her deceased husband (together the "Spanagels") received from Mrs. Brugmann. Mrs. Brugmann died during the pendency of the proceedings in the trial court, and Mr. Williams was appointed administrator of Mrs. Brugmann's estate with the will annexed by the Register of Wills for New Castle County, Delaware. (B-101).[1]

At no time did the Petitioner nor anyone else challenge Mr. Williams' appointment.

The plaintiff in the trial court moved for the substitution of Mr. Williams as the real party-in-interest. (B-97). Although the motion was not formally granted by the

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[1] "B-___" refers to the Appendix to Appellees' Answering Brief which is docket number 56 in the docket of the Supreme Court of the State of Delaware.

## PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6 – Continued

trial judge, the parties amended the caption to reflect the substitution. On appeal to the Supreme Court of Delaware, the Petitioner referred to SCS as the appellee, but the Supreme Court of Delaware changed the caption to reflect Mr. Williams as the correct appellee. In this Petition, Mr. Williams is the correct Respondent.

To the extent the Court considers Respondent SCS to be a party to this Petition, SCS is a privately-held Delaware corporation. There is no parent or publicly-held company owning 10% or more of the corporation's stock.

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## STATEMENT OF THE CASE

Respondents disagree with many of the "facts" set forth by the Petitioner in her Petition. The correct record of this case is set forth below.

### A. *General Background.*

The Spanagels, who had some association with Mrs. Brugmann through Mr. Spanagel's mother, assisted Mrs. Brugmann with her financial affairs after her husband's death in 1986. (B-207-209). Shortly after her husband's death, Mrs. Brugmann granted a power of attorney to Mr. Spanagel. (B-1;208).

On June 18, 1987, Mrs. Brugmann deeded her home to the defendants. (B-11). The "purchase" price was $125,000.00. (*Id.*). The defendants paid her $50,000.00 and gave her an unsecured promissory note[2] for the remainder. (B-151A-B). That note was never paid, although Mr. Spanagel's testimony regarding the note was, at best, inconsistent. *See* 9/14/00 Op. at 6, 8, n.14.[3]

The Spanagels continued to manage Mrs. Brugmann's affairs until 1990 when Mrs. Brugmann temporarily relieved Mr. Spanagel as her attorney-in-fact and appointed Respondent SCS, a private guardianship agency, in his place. (B-210). However, Mr. Spanagel was re-appointed as Mrs. Brugmann's attorney-in-fact only a few months later. (B-211-212).

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[2] The note itself is not in the record.

[3] The September 14, 2000 Memorandum Opinion of the trial court (Doc. 5) is hereinafter referred to as "9/14/00 Op."

The Spanagels continued to handle Mrs. Brugmann's affairs for several more years. The Spanagels placed Mrs. Brugmann in the Forwood Manor Nursing Home in April of 1991. The nursing home instituted guardianship proceedings in 1995 because the Spanagels stopped paying her nursing care bills. That petition was opposed by the Spanagels and a hearing was held on June 30, 1995 at which the Spanagels attended and testified. (B-20). At the conclusion of the hearing, the court appointed SCS as the guardian of the person and property of Mrs. Brugmann and directed SCS to obtain an accounting of Mrs. Brugmann's finances from the Spanagels. (B-21-22).

SCS was the original plaintiff of this suit which was filed on August 18, 1995. (B-27). The complaint filed by SCS demanded that the Spanagels provide an accounting of their handling of Mrs. Brugmann's affairs, and sought the imposition of a constructive trust on the property which Mrs. Brugmann had transferred to the Spanagels. (*Id.*). Mrs. Brugmann died March 12, 1996. (B-100). On March 7, 1997 John H. Williams, Jr., Esquire, was appointed administrator of Mrs. Brugmann's estate with the will annexed. (B-101). On April 16, 1997, SCS moved to substitute Mr. Williams as the plaintiff in the suit.[4] (B-97).

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[4] It appears from the trial court's docket that the motion for substitution was never actually signed by the trial judge. However, it is beyond dispute that the parties litigated the remainder of the case under that supposition. The parties and the trial court used Mr. Williams' name thereafter in the caption of the case.

**B.** ***Course of the Proceedings.***

When it filed the suit originally, SCS filed a praecipe directing service to be made on the defendants by serving the Secretary of State of Delaware pursuant to DEL. CODE ANN. tit. 10, § 3104 (Rev. 1974)(the "long arm statute"). (B-32). Service on the Secretary was accomplished on August 30, 1995 and returned on September 12, 1995. (B-33; A-17).[5]

On September 15, 1995, SCS mailed a letter in compliance with the long arm statute to the Spanagels by registered mail and enclosed a copy of the summons and complaint. (B-45-46). The letters were addressed to 5132 Paw Paw Lane, Cambridge MD 21613. (B-47). The letters were returned to SCS's attorney marked "unclaimed." (*Id.*).

On October 17, 1995, SCS filed a proof of non-receipt of notice by the Spanagels. (B-43). On October 24, 1995, SCS filed a motion for default judgment. (B-55). As a result of that motion, on November 15, 1995, the trial court entered an order to show cause directed to the Spanagels, requiring them to file an answer to the complaint on or before December 15, 1995. (B-61). The order was sent to the same Paw Paw Lane address that SCS had been using for its letters and notices to the Spanagels. (*Id.*).

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[5] "A-___" refers to the Appendix to Appellant's Opening Brief which is docket number 47 on the docket of the Supreme Court of the State of Delaware.

The Spanagels did not file an answer, but they did send a letter to the trial court, dated December 14, 1995, complaining that they did not have a copy of the complaint.[6] (B-60). On December 21, 1995, SCS's counsel sent a detailed letter to the trial judge explaining the various efforts he had undertaken to ensure the Spanagels had received the complaint. (B-62A-D). The letter detailed the following:

- Counsel mailed a copy of the complaint to the Spanagels by regular first class mail (that is, in addition to the long arm service required by the statute) which was not returned. Let. ¶2

- A further copy was provided to an attorney who was representing the Spanagels at the time. ¶4.[7]

- That attorney contacted SCS's attorney and requested that the complaint be faxed directly to the Spanagels and gave a fax number for that purpose. The fax went out on August 24, 1995. ¶6. (B-48-49).

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[6] The fact that the Spanagels obviously received the trial court's order to show cause where it was sent to Paw Paw *Lane* casts doubt as to the Spanagels' statements that they had not received previous correspondence from the plaintiff because it was sent to Paw Paw *Lane* instead of Paw Paw *Point*.

[7] The Spanagels have contended that this particular attorney was not their lawyer. Although the attorney never entered his appearance in this case, he did represent the Spanagels in a contemporaneous case pending in another state trial court. (B-23-26). Also, the same lawyer represented the Spanagels in connection with their attempts to sell the property which led to the filing of this suit. (B-36A, 37, 37A-40, 51-53).

- The Spanagels received notice of a *lis pendens* filed against the property by SCS by letter dated August 25, 1995. ¶7.
- Copies of the default judgment motion were sent to the Spanagels and again, the mailing was not returned. ¶9.
- Other letters to the trial court were copied directly to the Spanagels and not returned. ¶¶10, 11.
- The Spanagels' letter in response to the order to show cause clearly proved that they had received notice of the proceedings. ¶12.

Although SCS sought immediate judgment in its December 21 letter, the trial judge decided to give the Spanagels another chance. On December 22, 1995, the court entered another order to show cause directing the Spanagels to file an answer on or before January 19, 1996. (B-62). The Spanagels responded with a letter dated January 17, 1996 in which they continued to maintain that they never received the complaint. (B-64).

On March 1, 1996, SCS sent a letter to the trial court again asking for a default judgment to be entered. (B-69). The letter informed the trial court that SCS had hired a process server to personally deliver the complaint to the Spanagels. (*Id.*). The process server's affidavit indicated that service was made on February 12, 1996 and that the person receiving service admitted to being Rose Marie Spanagel, "however, after serving document/s the subject was not willingly accepting of document/s." (B-68).

On March 4, 1996, the trial court entered default judgment against the defendants. (B-71). On that same day, the Spanagels, through new counsel, filed an answer.

(B-72). In their answer, the Spanagels denied the substantive allegations of the complaint, but they raised no affirmative defenses, and no defenses based on lack of personal jurisdiction or insufficiency of service of process. (*Id.*).

On May 1, 1996, the Spanagels filed a motion to set aside the default judgment. (B-82-84). In support of that motion, the Spanagels argued *only* that the answer was timely filed. (*Id.*). The Spanagels again failed to allege lack of personal jurisdiction or insufficiency of service or process. In fact, the motion to set aside default judgment actually conceded the sufficiency of service. (B-83, ¶1). SCS filed a response to the motion (B-90) and on May 14, 1996, the trial court issued a short letter order finding no basis to set aside the default judgment. (B-96).

After he replaced SCS as the plaintiff, Respondent Williams spent the next two years trying to resolve the case. At one point, in August of 1998, the parties actually executed a settlement agreement, but the Spanagels later repudiated the agreement claiming that Mr. Spanagel did not understand it. (B-112).

A hearing was scheduled for March 26, 1999. (B-113). The defendants attended the hearing, represented by counsel.[8] The trial court directed counsel to submit letter

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[8] The Spanagels went through several attorneys in this case. The attorney who filed the answer and original motion to set aside default judgment was permitted to withdraw on September 15, 1997. (B-104; A-4). New attorneys represented the Spanagels for a while, but withdrew after the settlement went awry in September of 1998. (B-109). Another lawyer entered his appearance and represented the Spanagels during the first part

memoranda as to the effect of the default judgment on the issues pending. The court also heard testimony from the Respondents' witnesses as well as from an attorney who was called by the Spanagels as a fact witness on the issue of the transfer of the property.

Per the trial court's instructions, Respondents submitted a memorandum on the effect of the default judgment on the Spanagels' liability. (B-152). The Spanagels chose not to file a memorandum of their own. On April 9, 1999, the trial judge issued an order granting the specific equitable relief prayed for in the complaint and ordered the Spanagels to execute a corrective deed transferring the property to the Respondents. (B-158).

The Spanagels chose to disregard the trial court's April 9 order, which led the Respondents to file a motion for performance by substitute under Court of Chancery Rule 70(a) on April 22, 1999. (B-159). The Spanagels did not contest the motion, and it was granted by the trial court on April 27, 1999. (B-164).[9]

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of the inquisition hearing. He was replaced by another lawyer in July of 1999. (B-166). That lawyer represented the Spanagels through the second part of the inquisition hearing and through the post-trial briefing, but he withdrew after the trial court issued its opinion in September of 2000. (B-270). The Spanagels hired a new attorney to handle the appeal to the Delaware Supreme Court, and yet another attorney to file the reply brief in that appeal.

[9] The Register in Chancery deeded the property to Respondent Williams. Eventually, Williams sold the property to third parties. (B-264). The sale was approved and confirmed by the trial court. (B-260; 268).

On September 13, 1999, the Spanagels filed another motion to vacate the default judgment. (B-168). For the first time, the Spanagels contended that the court had not acquired personal jurisdiction over their persons and that service of process was insufficient. The Respondents responded to the motion (B-177) and on September 21, 1999, the trial court denied the motion. (B-198; A-242). The inquisition hearing re-convened on December 20, 1999 at which time the Spanagels were afforded the opportunity to present their case.

After post-hearing briefing, the trial court issued its memorandum opinion on September 14, 2000. In its opinion, the trial court granted most of the substantive relief sought by the Respondents. A form of order implementing the court's findings was signed by the trial court on October 2, 2000. (B-269).

The Spanagels filed an appeal to the Supreme Court of Delaware on October 31, 2000. On November 7, 2001, the Supreme Court of Delaware issued an order affirming the trial court's decision for the reasons stated by the trial court in its several opinions and orders. (A-20). The Petitioner filed a motion for rehearing by the court *en banc*, which was similarly denied by order dated December 7, 2001. (A-13). The Petitioner filed this Petition with the Court on March 7, 2002.

### C. *Summary of the Evidence.*

Mr. Thomas Posatko testified on behalf of the Respondents. He is the President of SCS. (B-122). Mr. Posatko testified that Forwood Manor Nursing Home

instituted guardianship proceedings because Mrs. Brugmann's nursing home bill was substantially in arrears and arrangements needed to be made for her care. (B-136). Upon SCS's appointment as guardian of Mrs. Brugmann, the trial court directed the Spanagels to provide information and an accounting to the SCS, but the Spanagels did not do so. (B-125, 128).

Mr. Posatko learned that the Spanagels had submitted a financial statement to the nursing home indicating that Mrs. Brugmann had assets totaling $152,000.00 in April of 1991. (B-126). He also learned that the Spanagels had received Mrs. Brugmann's home for what appeared to be a grossly inadequate price. (B-131-32). As guardian, Mr. Posatko objected to a pending sale of the property by the Spanagels, but then reached an agreement under which the sale proceeds would be held in escrow. (B-133). Despite their agreement, the Spanagels failed to attend the settlement, and the property was not sold. (B-134).

Following Mrs. Brugmann's death, Mr. Posatko filed his final accounting and turned matters over to Mr. Williams. (B-135). There were outstanding bills to the nursing home and a state health care facility which he could not pay with Mrs. Brugmann's accumulated income. (B-136).

Mr. Williams also testified. He was appointed to handle Mrs. Brugmann's estate in March of 1997. (B-138). The Register of Wills asked for his assistance in handling the estate in light of the pending litigation. (B-139). Like Mr. Posatko, he never received any accounting or other information from the Spanagels. (B-141). He testified that the Spanagels paid Mrs. Brugmann $50,000.00 in cash for a

home which was worth approximately $125,000.00. (B-142). Mr. Williams stated that the Spanagels provided Mrs. Brugmann with a purchase money mortgage for $75,000.00. (*Id.*).[10]

The Spanagels' former attorney testified on their behalf. He handled the transaction in which the Spanagels acquired the property from Mrs. Brugmann. (B-145-49). He testified that Mrs. Brugmann understood what a purchase money mortgage was, and told him that she wanted to transfer the property to the Spanagels so she could pass away peacefully at home. (B-148). On cross-examination, the lawyer conceded that Mrs. Brugmann did not have separate legal representation in the transaction. (B-150-51).

Mr. Spanagel testified that he and his wife cared for Mrs. Brugmann completely after her husband's death. (B-208). He said that all she could do was watch television and dress herself. (B-215). Mrs. Brugmann appointed him as her attorney-in-fact on June 6, 1986. (B-208-09). Mr. Spanagel testified that Mrs. Brugmann deeded her property to him and his wife. (B-217-18). He said he made a "partial payment" of $50,000.00. (B-218). He thought the deal was that he and his wife would "work off" the remaining $75,000.00 purchase price by providing care to Mrs. Brugmann. (B-218-19). He denied that a promissory note was tendered for the balance. (B-219).

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[10] Mr. Williams' recollection was mistaken on this point. The Spanagels did not give Mrs. Brugmann a purchase money mortgage. The record indicates that they signed an unsecured $75,000.00 promissory note in her favor, although Mr. Spanagel denied even doing that. (B-219).

Despite his denial that a promissory note existed, Mr. Spanagel attempted to introduce into evidence a note forgiveness agreement allegedly signed by Mrs. Brugmann. (B-10). The Spanagels could not verify that the agreement was actually signed by Mrs. Brugmann, accordingly, the Court ruled that it was inadmissible as evidence. (B-226).

Mr. Spanagel testified that in April of 1991, he completed the application to move Mrs. Brugmann into the nursing home. (B-230). He admitted that he intentionally misrepresented the amount of Mrs. Brugmann's assets on the application to qualify her for admission. (*Id.*). In order to claim that Mrs. Brugmann had assets of at least $150,000.00, he indicated on the application that she had "notes due" to her of $71,000.00. (B-232). He also intentionally misrepresented her monthly income. (B-234).

On cross-examination, Mr. Spanagel admitted that following the death of her husband, Mrs. Brugmann had approximately $30,000.00 in various bank accounts, a home worth approximately $120,000.00, and insurance proceeds of about $16,000.00. (B-236-38). He was unable to account for his handling of Mrs. Brugmann's affairs during the time period of 1986 through 1990. (B-240). He claimed that a third person had taken Mrs. Brugmann's financial documents, but he admitted that he had done nothing to retrieve them other than writing her a letter. (B-241).

Mr. Spanagel admitted that he used Mrs. Brugmann's funds to pay the utilities and expenses on the property. (B-256). This was inconsistent with his position that he and his wife obtained title to the property in 1987, and

that he was entitled to retain all rental income from the property. He conceded that he was essentially holding the property for her in case she needed it to pay her expenses. (B-256-57). Mr. Spanagel also stated that he had made two payments on the promissory note to Mrs. Brugmann in 1990. (B-258). He did it because she was "upset about money" and he wanted to "quiet her down." (*Id.*).

### D. *The Trial Court's Decision on the Merits.*

In its opinion, the trial court granted most of the substantive relief sought by the plaintiff. Most importantly, it extended the constructive trust on the property to the rents chargeable to the Spanagels during the time in which they held legal title. The trial court further denied or discounted many of the set-offs claimed by the Spanagels during their damages presentation.

Having heard the parties' testimony, the trial judge came to the following factual conclusions:

- Mrs. Brugmann was an elderly disabled person who needed assistance in handling her personal and financial affairs. 9/14/00 Op. at 4.
- On June 6, 1986 Mrs. Brugmann appointed Mr. Spanagel as her attorney-in-fact and for the next nine years Mr. Spanagel handled Mrs. Brugmann's financial affairs. *Id.*
- The defendants were unable to account for Mrs. Brugmann's funds for four years between 1986 and 1990, although during the same time period they had no trouble producing receipts that they could claim as expenses. *Id.* at 5.

- Mrs. Brugmann was not represented by counsel when she conveyed her property to the defendants. *Id.*
- Mr. Spanagel's testimony was inconsistent on a number of key issues. *Id.* at 6, and n.12.
- Mr. Spanagel's testimony in general lacked credibility. *Id.* at 8, n. 14.
- The Spaangels made no effort to account for the rents they collected for the property. *Id.* at 8.
- Mr. Spanagel admitted that he was "holding on to that house . . . in case Mrs. Brugmann needed it back or he needed to sell it to pay expenses." *Id.* at 8-9.
- The Spanagels failed to comply with a court order to provide an accounting to SCS. *Id.* at 10.
- "In this case there is no question that the Spanagels violated their fiduciary duty to Mrs. Brugmann in handling her financial affairs, and that they conducted their defense of this litigation in a manner that was at best highly irresponsible." *Id.* at 23.

## REASONS FOR DENYING THE WRIT

The Petitioner has no compelling reason for review by this Court. This case is simply an application of well-established rules of civil procedure. The trial court granted a default judgment against the Petitioner and her late husband after they failed to obey multiple orders of the court to file an answer to the Respondents' complaint.

A motion to vacate the default was denied by the trial court shortly after the judgment was entered. Thereafter, the parties engaged in extended and protracted post-judgment proceedings over the course of several years.

The Petitioner belatedly filed a second motion to vacate and argued that she and her deceased husband had not been properly served with process under Delaware's long arm statute, DEL. CODE ANN. tit. 10, § 3104 (Rev. 1974), because the registered mail letter required under the statute was sent to the wrong address. The trial court held that the Petitioner had failed to persuade on the merits of the argument. Moreover, the court held that the Petitioner (i) had been personally served with the complaint; (ii) had appeared and participated in the damages inquisition; (iii) had previously conceded sufficiency of service of process; and (iv) had waived the right to contest sufficiency of service or personal jurisdiction based on having participated in four years of litigation without raising the issues.

The Supreme Court of Delaware reviewed the trial court's ruling on these and other issues and affirmed for the reasons and bases stated by the trial court. The Supreme Court of Delaware did not decide an important issue of federal law. Sup. Ct. R. 10. The Petitioner has alleged only a misapplication of the rules of civil procedure, a state law issue. The trial court gave the Petitioner ample opportunity to comply with its orders and file an answer to the complaint prior to granting a default judgment. The court also ruled on two separate motions to vacate filed by the Petitioner and her late husband and found them meritless. The trial court's rulings were reviewed by the Supreme Court of Delaware and upheld.

Review by this Court is not warranted. The Petitioner has received all of the process that is due to her.

## I.

## NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION

The Respondents strongly contest the Petitioner's assertion that their counsel committed a fraud upon the Court or committed perjury. The Petition is rife with misstatements and misrepresentations of the record. The Petitioner contends that the Respondents' counsel admitted to fraud by conceding in his answering brief to the Delaware Supreme Court that as a technical matter, service had not been effectuated under Delaware's long arm statute. This concession was made for the sole reason that Delaware's long arm statute has been construed to require a plaintiff serving process to send a *second* registered letter to the defendant's last known address where the first is returned unclaimed. *See, e.g., Greenly v. Davis,* 486 A.2d 669, 671 (Del. 1984).

In this case, the Respondent failed to send the second registered letter, an error that was not recognized by Respondents' counsel until the Petitioner appealed to the Delaware Supreme Court. However, the Respondents' attorney *never* represented to the trial court that the second letter was sent when in fact it was not. Rather, the Respondent argued service was proper. This was a legal conclusion rather than a factual representation, and was founded on a mountain of other efforts, amply supported by the record, the Respondents' attorney made to ensure

the Spanagels had notice of the complaint. In addition, the fact that service was not technically made under the long arm statute became irrelevant because the Spanagels did not properly raise the issue before the trial court and therefore were deemed to have waived it.

In the end, it was apparent to the trial court that the Spanagels were more concerned with gamesmanship and evading service than with addressing the dispute on its merits. The Spanagels deliberately ignored court orders to respond to the complaint. Although they argued they never received the complaint, that argument was incredulous given the record. The Spanagels have no one to blame but themselves for the turn of events taken in the trial court. Even if one believes that they did not receive a copy of the complaint, instead of obsessing over minutiae, the Spanagels could have obtained a copy of the complaint from numerous sources, including their own lawyer, and the court itself. If they believed that service of process was insufficient the Spanagels could have raised the issue as an affirmative defense or, instead of filing an answer to the complaint, they could have filed a motion to dismiss pursuant to Court of Chancery Rule 12(b)(2) and (5).[11] The Spanagels failed to avail themselves of these procedural avenues, instead choosing to disregard the court's orders.

Thus, the issue before the trial court and the Delaware Supreme Court had nothing to do with misguided allegations of fraud and perjury. The issue had to do with

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[11] The Rules of the Court of Chancery of the State of Delaware are substantially similar to the Federal Rules of Civil Procedure for matters relevant to this Petition.

whether the trial court properly entered, and refused to vacate, a default judgment against the Spanagels where they deliberately chose to ignore two orders of the trial court to file a responsive pleading.

## II.

## THE SPANAGELS' DUE PROCESS RIGHTS HAVE NOT BEEN VIOLATED

The Petitioner believes her civil rights have been violated by the Respondents and the court system of the State of Delaware. Specifically, she claims she did not receive proper notice and an opportunity to be heard before the default judgment was entered against her and her late husband. As the trial court and the Supreme Court of Delaware found, this argument is meritless.

First, the record before the trial court was that the Respondents' counsel undertook numerous efforts to provide the Spanagels with the complaint. The Spanagels resisted these efforts and undertook a campaign of purposeful passivity in responding to the suit. It was simply not credible that the Spanagels did not have a copy of the complaint in the face of the efforts of Respondents' counsel. The injustices claimed by the Petitioner are chimerical. The real injustice is that the Respondents' attorney tried so arduously to comply with the duties placed on him by the rules of procedure and due process, and yet, he must listen to the Petitioner besmirch his professional character and accuse him of trying to pull the proverbial "fast one." Nothing could be further from the truth. Respondents' counsel did everything to get beyond the service issue so that the case could be heard on its merits. He wanted to move the case forward because it was

meritorious. The Spanagels resisted at every turn, a telling sign that their defense (as the trial court ultimately found) was wanting.

But, even if one believes that the Spanagels did not actually receive a copy of the complaint before they were personally served in February, 1996, there is no doubt in the record that the Spanagels, at the very least, knew that a case was pending against them and had the opportunity to obtain a copy of the complaint from a wide variety of sources. The trial court did not grant the motion for default judgment in a knee-jerk fashion. It twice ordered the Spanagels through rules to show cause to plead in response. The Spanagels could have done so, they simply chose not to.

Finally, the Petitioner does not understand that her right to due process, as it is implicated in this case, is not without limits. The rules of procedure in the trial court, as in the federal courts, clearly provide that defenses based on lack of personal jurisdiction and insufficiency of service of process are waived if not raised properly. Fed. R. Civ. P. 12(h); Ct. Ch. R. 12(h). "Where a defendant leads a plaintiff to believe that service is adequate and that no such defense will be interposed . . . courts have not hesitated to conclude the defense has been waived." *Trustees of Central Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 733 (7th Cir. 1991). In this case, although the Spanagels informally complained about service in letters to the trial court, they utterly failed to raise the issue either by way of pleading or by motion. When they attempted to vacate the default judgment the first time, they did not even allege that service was improper. They conceded its sufficiency and argued the answer they

belatedly filed was timely. Thereafter, Spanagels participated actively in post-judgment proceedings for more than three years before raising the issue in their second motion to vacate the default judgment. Under these circumstances, the trial court was absolutely correct in finding that the Spanagels waived the right to contest service or process, and the Supreme Court of Delaware was correct in affirming that ruling.

## CONCLUSION

This case does not merit any further review by this Court. For the foregoing reasons, the Court should deny this Petition for Writ of Certiorari.

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